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In the Supreme Court of the United States

OCTOBER TERM, 1979

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO AND COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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I.

Respondents argue that the Board has defined the work in controversy solely in terms of the off-pier work performed by consolidators and truckers after the advent of containerization, while disregarding the work performed by longshoremen at the pier prior to the advent of containerization (ILA Br. 18, 24;

NYSA Br. 19, 22, 27-29). This contention is based on a misconception of the Board's findings and a misunderstanding of the services performed by consolidators and truckers for their shipper customers.[1]

Respondents do not dispute that prior to containerization there was an "already established industry of freight forwarding" to which the "consolidation business * * * naturally gravitated" (ILA Br. 7-8). Nor do they disagree that this "already established industry" performed services for shippers not performed on the pier by ILA labor (NYSA Br. 39). However, they contend that the stuffing and stripping of containers was not part of the work of this established industry (ILA Br. 7; NYSA Br. 5-6, 15). "Prior to containerization, all the work of loading, unloading, sorting or otherwise handling ocean-borne cargo was performed exclusively by longshoremen at the piers" (NYSA Br. 29). They further assert that consolidators entered the market only as a result of a scheme

[1] Although respondents contend that the question before the Court is solely a question of "law" (ILA Br. 21-24; NYSA Br. 26-27), their legal contentions rest on a version of the facts that disagrees with the Board's findings concerning the work traditions of longshoremen, truckers and consolidators—findings relating to time periods both before and after containerization. See Board Br. 8-10, 13-18, 20-22. Moreover, this Court repeatedly has stated that the Board's inferences and conclusions, as well as its underlying factual findings, are entitled to judicial deference. See, *e.g.*, *American Broadcasting Companies* v. *Writers Guild of America*, 437 U.S. 411, 432-433 (1978).

to lower labor costs by "subcontracting" on-pier consolidation work (ILA Br. 7-8; NYSA Br. 5-6, 31).[2]

However, as shown in our opening brief (Br. 8-9 & n.4; see also Tidewater Br. 14-16), before the advent of containerization, consolidators, operating at their own inland terminals, combined the goods of various shippers destined for shipment on particular vessels and secured the delivery of those goods to the pier. From the first appearance of containers in the Port of New York in the 1940s until the enforcement of the Dublin Supplement in 1973 and 1974, consolidators have continued to perform this service, utilizing different sized containers in their traditional work of combining small shipments of goods received from their own customers (A. 117-118).[3] As the Board explained in *International Longshoremen's Association (Consolidated Express, Inc.) (Conex)*, 221 N.L.R.B. 956, 959-960 (1975): "for many years,

[2] The Board specifically rejected this subcontracting argument, finding that "[t]here is no evidence in the record to lend the slightest credence to these contentions" (Pet. App. 96a). The court of appeals did not disagree with that finding (Pet. App. 21a-22a).

[3] Containers did not come into existence for the first time when container ships appeared in the mid-1960s. Containers gradually evolved over three decades from small boxes, to lockers, to large receptacles specially designed for carriage in container ships. See *International Longshoremen's Association (Consolidated Express, Inc.) (Conex)*, 221 N.L.R.B. 956, 957, 959-960 (1975); *Humphrey* v. *International Longshoremen's Association*, 548 F.2d 494, 498-499 & n.16 (4th Cir. 1977). Such containers traditionally moved over the docks without stripping or stuffing by ILA labor, unless shippers or consignees requested pier-side handling of their cargo. *Ibid.*

maritime cargo has been sorted and consolidated off the docks by companies employing teamsters and unrepresented employees. With the advent of vessels designed exclusively to carry the large containers presently in use, these consolidating companies * * * have continued to consolidate shipments into containers * * * * * [U]ntil the enforcement of the Dublin Supplement in 1973 which gave rise to this proceeding, ILA has handled the containers of [the consolidators]. Thus, with few exceptions, ILA has loaded such containers without stripping and restuffing." See also Pet. App. 94a-95a.[4] Similarly, from the introduction of containers in the Ports of Baltimore and Hampton Roads in the mid-1960s, truckers have stripped FSL containers when they considered it necessary or expedient to do so (Board Br. 14-16; Tidewater Br. 14; A. 24-29, 45, 54, 74). As the Board found (Pet. App. 164a) (ALJ finding adopted by the Board): "the history of the longshoremen's work tradition in Baltimore and Hampton Roads shows that their role in handling break-bulk import cargo ended at the head of the pier * * *. Thereafter, the fate of that cargo was the responsibility of the motor carrier, as set forth in the bill of lading. The advent of containerization in the ports of Baltimore and Hampton Roads did not change the traditional role of the ILA longshoremen

[4] Intervenor Dolphin points out that one of the first off-pier consolidators in New York (its predecessor company) offered regular container services in 1949 (Dolphin Br. 8); see also *Balicer* v. *International Longshoremen's Ass'n*, 364 F. Supp. 205, 220-221 (D. N.J. 1973). ILA labor did not interfere with Dolphin's containers until 1974 (A. 586-587).

* * * with very rare exceptions, motor carriers have freely picked up the steamship company's containers * * * and have stripped the shippers' loads from them * * * using truck terminal employees, whenever considerations of state regulation, safety, or economy persuaded a motor carrier to take that precaution." [5]

Under these circumstances, the Board reasonably found that the Rules on Containers and the Dublin Supplement constitute a boycott to take away work that other employees and employers have traditionally performed. This is not work preservation: to the contrary, it is an aggrandizement of the work opportunities of longshoremen at the expense of other persons at inland facilities with established work traditions of their own.

[5] NYSA's assertion (NYSA Br. 15-16; see also ILA Br. 11-13) that it has been the "unequivocal and consistent interpretation by both labor and management in the longshore industry that the Rules prohibited shortstopping of FSL containers at local warehouses or trucking terminals" is contradicted by the record. Prior to the 1968 collective agreements with the Hampton Roads and Baltimore Shipping Associations (HRSA and STA), truckers routinely shortstopped FSL loads. Thereafter, the ILA asserted that the Rules precluded that practice. At a meeting of the HRSA negotiating committee and representatives of the ILA held in 1969 (A. 421-439), several employer representatives replied that the Rules did not preclude stripping of FSL containers at terminals and warehouses (A. 424, 429-432). Moreover, despite the fact that truckers routinely stripped FSL containers, only a handful of complaints involving the stripping of FSL containers were filed with the STA-ILA Joint Container Committee during the period between September 1969 and November 1974 (Pet. App. 152a-153a). As late as 1974, members of the STA still denied that shortstopping FSL cargo could be construed to be a violation of the Rules (A. 92-94).

II.

Respondents also contend that containers are merely parts of the hold of a ship (ILA Br. 8, 29-30), and that it is immaterial to shippers whether containers are stripped or stuffed at the dock or at inland terminals of consolidators or truckers (ILA Br. 31-32, 37). They contend that cargo handling within 50 miles of the docks cannot benefit shippers and does not contribute to efficiency. These contentions, however, ignore the fact that many shippers deliberately select local cargo handlers to serve their special transportation needs. And they do so for good reason.

Containerization obviates the need for on-pier handling of cargo with its substantial risk of damage, misrouting and theft.[6] Equally important, containerization allows the freight forwarder or consolidator to control the movement of cargo and to expedite its delivery (see Board Br. 35-36). As the Federal

[6] As noted by Intervenor Dolphin (Dolphin Br. 7), reduction of pilferage and damage in on-pier cargo handling is one of the primary purposes of containerization and has been cited uniformly as one of its greatest advantages. Indeed, the affidavit of NYSA's vice president (A. 595-625) notes that, after World War II, steamship lines first acquired containers "for highly pilferable, fragile and hazardous cargoes" (A. 602). Twin Express (one of the trucking companies that complained to the Board in *Conex*) found that ILA handling of its cargoes triggered "a great proliferation of [damage and loss] claims both in number and dollar size." *Balicer* v. *Longshoremen*, 86 L.R.R.M. 2559, 2562 (D. N.J. April 19, 1974). See also *Balicer* v. *Longshoremen*, *supra*, 364 F. Supp. at 219-220.

Maritime Commission study cited in our opening brief (*id.* at 6) explains, "[o]ne of the most important benefits of the NVOCC service is one of coordination and control of the traffic. For example, a cargo may take three to four weeks to travel from Chicago to Mayaquez via separate carriers but with close coordination, the NVOCC can achieve a seven day delivery." This advantage of NVOCC service is lost if consolidators must take their cargoes to the piers to be loaded piecemeal into containers (see A. 35). The consolidator then loses control over the loading of the container and cannot assure a timely departure. Moreover, on incoming shipments, the consolidator or trucker seeking to pick up cargo must wait at the pier for the cargo to be unloaded from the container by ILA labor. This has resulted in very substantial delays.[7]

[7] In a prior proceeding involving Twin Express, Judge Lacey found that:

> A random sample of Sea-Land documents revealed a great increase in delay in sailing after [ILA] stripping commenced in February 1973 resulting from the additional 20-24 man-hours needed to strip and stuff a container. Prior to February 1973 * * * containers seldom experienced delay in sailing, whereas such delay after February was a daily occurrence.

Balicer v. *Longshoremen*, *supra*, 86 L.R.R.M. at 2562. Judge Lacey also found that handling of the cargo at destination was seriously compromised by prior ILA stuffing at the pier because the "sequential loading arrangement to accommodate delivery by the truckmen at the place of destination" was "disarranged" in the process (*ibid.*).

Similarly, during the period that FSL containers were stripped at the pier by longshoremen at Hampton Roads,

In sum, there is no merit to ILA's argument that inland cargo handling within a 50 mile radius of the docks confers no significant advantages on shippers. Shippers would not opt for inland cargo handling if that were the case (see note 9, *infra*). The terminals of consolidators may be situated only an hour away from the pier, but the significance to the shipper lies in the very fact that they *are away* from the pier. This increases the ability of consolidators and truckers to expedite the movement of cargo and decreases the danger of loss, theft, and damage to the cargo.

Finally, if, as ILA contends, containers are merely extensions of the hold of the ship,[8] there would be nothing to preclude the union from amending the Rules to claim the work of stuffing and stripping containers even beyond the 50 mile radius (see Board Br. 53-54). This would further invade the separate market historically served by consolidators and truckers. We note that this is not a hypothetical concern, since the ILA interprets the Rules to forbid stripping

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there were "delays of five to eight days in the movement of container cargo" (Pet. App. 159a; A. 82, 205). Stripping at the pier also caused "much additional pilferage to the goods" (A. 205). Indeed, the employer members of the STA-ILA Joint Container Committee complained that "pilferage on Far East Traffic was terrific" (A. 422).

[8] Perhaps containers could properly be viewed as parts of the ship's hold when goods are brought to the pier in loose form for loading by longshoremen and are similarly to be unloaded in loose form at the destination pier. However, containers are also integral elements in land transportation and packaging. Containers are trailers, usually on wheels, that are fitted for trucks. They are specifically designed so that they can be loaded and unloaded away from the ship.

of FSL containers by truckers anywhere following pickup by truckers at the docks (A. 41, 92-93, 227-228, 18).[9]

III.

Respondents argue (NYSA Br. 35-39; ILA Br. 35-43) that the steamship companies have the right to control the work at issue because "the containers are the property of the steamship carriers who have full right, dominion and control over their disposition" (NYSA Br. 36). Respondents assert that the Rules on Containers are merely a mechanism by which the employers can control the work performed with their own property. Respondent NYSA (NYSA Br. 37 n.37) adds that the Rules have no application to "containers that are not the property of the [longshoremen's] employers."

a. The record directly refutes the latter contention. The Rules specifically apply to "[c]ontainers owned, leased or *used* by carriers" (Board Br. App. 3a, Rule 1(a)(1)) (emphasis added).[10] Indeed, San

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[9] Respondent NYSA refers (NYSA Br. 9) to cargo consolidated within 50 miles of the pier as "local cargo." It may be local in the sense that it is containerized locally. However, the consolidators who operate within the 50 mile radius solicit and handle cargo from a wide geographic area. Thus, San Juan's regional manager testified that the cargo it handled came from "[a]ll over the states * * * [it had] freight coming from Massachusetts, Chicago, Wisconsin, Ohio, New York, New Jersey, Connecticut, Maryland, South Carolina, North Carolina, Florida, Georgia, from all these points" (A. 535).

[10] *New York Shipping Ass'n* v. *ILA, Local 791*, 41 Lab. Arb. 809 (1963), cited by respondent NYSA (NYSA Br. 37 n.37), is not relevant here. That arbitration award construed the 1959 agreement which predated the Rules on Containers. The

Juan's regional manager testified that when he leased "foreign" containers owned by third parties at the suggestion of the shipping company and brought them loaded to the pier, "[t]hey were off-loaded by ILA members and loaded into PRMMI containers" (A. 533). See *Conex, supra*, 221 N.L.R.B. at 959, 960 ("even these trailers were stripped and stuffed by ILA labor at the piers"). In other words, even if consolidators used "foreign" containers to bring their cargo to the pier, their cargo would be stripped by ILA labor and stuffed into a container belonging to the shipping company. Dolphin's operating manager also testified that Dolphin could not operate in the Port of New York without obtaining containers provided by the shipping companies (A. 487).[11]

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arbitrator found that the 1959 agreement had no application to containers not owned by the employer, but noted that the parties could change the scope of the agreement in future negotiations. *Id.* at 810. That is precisely what they did.

[11] Respondent NYSA (NYSA Br. 13) argues that the shipping companies never refused to supply containers to Dolphin and San Juan—they merely required the consolidators to "truck their LCL cargo to the piers where it would be loaded into [the] containers by * * * longshore workers * * *." As we have shown, however, this requirement effectively precluded the consolidators from carrying on their business (see pages 6-8, *supra;* see also Board Br. 50-52). Similarly, while it is true (NYSA Br. 13 n.16) that Dolphin ceased doing business in the Port of New York because it would be cheaper to route its cargo through Jacksonville, the reason it was too expensive for Dolphin to operate in New York was because ILA insisted on rehandling Dolphin's cargo at the pier (A. 498-499). This activity had as its natural consequence a cessation of business relations or a substantial change in the method of doing business (see Board Br. 30-32 & n.21). There can be no doubt, moreover, that the Rules expressly require a cessation of business relations. Rule 1(e) provides that "[n]o carrier or direct employer shall supply its containers to any consolidator or deconsolidator." Likewise, Rule 7(d) provides that "[a]ny facility operated in violation of the Container Rules will not have service supplied to it by any direct employer." See Board Br. App. 4a, 8a. Respondents enforced these rules according to their literal terms by imposing a boycott (Board Br. 12-13, 18-19).

b. In any event, as pointed out in our main brief (Board Br. 46 n.31; see also Tidewater Br. 57-67), ownership of the containers does not vest the steamship companies with the legal right to deny their services to shippers on a discriminatory basis.[12] The notion that steamship companies may grant or withhold containers and carriage on their ships as they see fit is totally inconsistent with the common carrier obligations of such companies. See Section 16 of the Shipping Act of 1916, 46 U.S.C. 815 (forbidding any common carrier by water, "directly or indirectly," to subject "any particular person * * * or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever * * *"). See also Section 14 Fourth of the Act, 46 U.S.C. 812 Fourth (prohibiting discrimination in providing "cargo space accommodations or other facilities"); Section 17 of the Act, 46 U.S.C. 816 (requiring common carriers to observe "just and rea-

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[12] The issue here is not whether the steamship companies have the right to refuse to lease containers. The carriers do lease containers. They do so, however, on a discriminatory basis.

sonable regulations and practices relating to the "receiving" or "handling" of cargo); Section 18(a) of the Act, 46 U.S.C. 817(a) (requiring reasonable practices and charges in relation to packing, delivering and transporting cargo). These provisions forbid a common carrier to discriminate among shipper-customers or to cut off services that traditionally have been provided to customers if they are prepared to tender their goods and pay the charge prescribed by tariff. See *Grace Line, Inc.* v. *Federal Maritime Board*, 280 F.2d 790, 792-793 (2d Cir. 1960), cert. denied, 364 U.S. 933 (1961); *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 303 (1937). Applying the literal terms of the Shipping Act, the Federal Maritime Commission has determined that the Rules on Containers violate the statute insofar as they require shipping companies to deny containers to shippers who use consolidators operating within 50 miles of the docks. See *Sea-Land Service, Inc., and Gulf Puerto Rico Lines* (No. 73-17) and *Puerto Rico Maritime Shipping Authority—Proposed ILA Rules On Containers* (No. 74-40), 16 S.R.R. (Pike & Fisher) 315, aff'd, 18 S.R.R. 553 (F.M.C. June 14, 1978), review pending, No. 78-1176 (D.C. Cir.).[13]

[13] The suggestion of ILA (ILA Br. 38) that this Court should not consider the views of the FMC in Nos. 73-17 and 74-40 because judicial review is still pending are without merit. Those decisions simply apply the literal text of the Shipping Act to the Rules on Containers. The decisions represent the views of the expert agency in this area and are in accordance with the judicial authorities cited above. Moreover, whether or not the Rules on Containers must be filed with and approved by the FMC under Section 15 of the Shipping Act, 46 U.S.C. 814 (a provision which applies to several categories of anticompetitive agreements), the FMC is empowered to determine in an appropriate proceeding that the Rules violate the specific prohibitions contained in Sections 14, 16, 17 or 18 of the Act. See *FMC* v. *Pacific Maritime Association*, 435 U.S. 40, 68, 77 (Powell, J., dissenting on other grounds). See also FMC rulemaking release, Docket No. 78-11 (General Order 44) at 15-16 (Apr. 10, 1980).

See also *Consolidated Express, Inc.* v. *Sea-Land Service, Inc.*, No. 73-27 (Mar. 26, 1976), 16 S.R.R. (Pike and Fisher) 817; *South Atlantic and Caribbean Line, Inc.*, 12 F.M.C. 237, 239-241 (1969).

Contrary to respondents' assertions (NYSA Br. 36 n.36; ILA Br. 39-40), the situation here is not comparable to that in *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612 (1967). In that case, the union sought to preserve traditional work for its members. Here, in contrast, the union is seeking to enlarge its work opportunities by taking for itself jobs that traditionally have been performed by others. Moreover, in *National Woodwork*, the employer had unilateral control over the selection of building materials for the job in question and could award the work in controversy without infringing the rights of any third party. In the present case, the steamship companies did not have unilateral control over the work in controversy. That work previously had been awarded to consolidators and truckers by shippers. As common carriers, the employer steamship companies could not use discriminatory measures to frustrate business relations between shippers and the consolidators and truckers which they retained. In this respect, the present case is comparable to *NLRB* v. *Enterprise Association of*

Pipefitters, 429 U.S. 507 (1977). There, the general contractor was contractually bound to use equipment manufactured by the boycotted company and the union and subcontractor could not override that obligation. Similarly, the employer-steamship companies here involved are required by law to make their services available to all shippers without discrimination. They are not legally entitled to use boycotts or economic sanctions against their shipper-customers in order to obtain the work in controversy for the union.

CONCLUSION

For the foregoing reasons and the reasons stated in our opening brief, the decision of the court of appeals should be reversed.

Respectfully submitted.

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